THE CONGLOMERATE MERGER: A NEED FOR CLARITY

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The Supreme Court terms of 1965-66 and 1966-67 brought to the center of antitrust attention a relatively new form of business arrangement. In two careful opinions, the Court affirmed Federal Trade Commission orders requiring large corporations to divest themselves of acquired concerns that were neither competitors of the respondent companies nor substantial purchasers of the products the respondent companies marketed.[1] The condemned acquisitions were conglomerate in nature; that is, there was no competitive relationship between the acquiring and the acquired firm. Yet because of certain factors, the Court found the acquisitions had the requisite effect under section 7 of the Clayton Act[2] to merit cancellations.

To those of us engaged in the antitrust field, there is reason to agree that "the conglomerate is where the action is" today.[3] We are now experiencing the third great corporate merger movement in our history, a movement which has already been acknowledged although it is apparently still gathering steam. According to Dr. Willard Mueller, the Chief Economist of the FTC, if the present rate of increase in business concentration continues, the country's 200 largest corporations, by 1975, "would control two-thirds of the total assets of American manufacturing corporations."[4] And in the forefront of this massive drive toward concentration is the conglomerate merger, the most prevalent type of corporation acquisi-

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1 FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); FTC v. Consolidated Foods, 380 U.S. 592 (1965).

2 No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C. § 18 (1964).

3 Dixon, *Conglomerate Merger Fever: The 1967 Virus,* Address before ABA Section of Antitrust Law, April 13, 1967.

4 *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., pt. 2, at 519 (1964-65).

tion occurring today.[5]

The threat posed to our present business system by the continuing wave of conglomerate mergers is real. The Chairman of the Senate Subcommittee on Antitrust and Monopoly, in urging increased antitrust surveillance of conglomerate acquisitions, pointed out that hearings before his committee concerning such acquisitions "demonstrated the ability of a corporation with a dominant position in one industry to spread its economic power into others."[6] The Assistant Attorney General in charge of the Antitrust Division, prior to assuming office, suggested that the conglomerate acquisition may have less economic justification than other types of mergers.[7] Subsequently, he has indicated the possible need for additional legislation to deal with the problem.[8] Moreover, in March of last year, the Congressional Joint Economic Committee observed that with the current wave of conglomerate mergers "the number of firms with substantial discretionary pricing power will rise sharply."[9] The Committee warned that in the absence of "strong antitrust intervention," the only answer, "if the public is to be protected . . . may be some sort of statutory price-wage surveillance and, perhaps, actual controls."[10]

But while the threat is real, it is not so great that, at least at this time, it requires application of a per se rule of illegality or suppressive legislation. Most conglomerate mergers are presently believed to have little or no adverse competitive effect. It is doubtful, however, that either the proponent of a conglomerate or its possible prosecutor could, at this point, offer a quick and decisive evaluation concerning the law as applicable to a pending conglomerate acquisition.

When one considers the size of the budgets of the Federal Trade Commission and the Antitrust Division of the Department of Justice[11] in the light of the duties assigned to these agencies, it can be readily understood that public education must rank ahead of prose-

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5 *Id.* at 516. *See also* Reilly, *Conglomerate Mergers—An Argument for Action,* 61 NW. U.L. REV. 522, 529 (1966).

6 Hart, *Emerging Paradoxes in Antitrust,* 30 ABA ANTITRUST SECTION 80, 82 (1966).

7 Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1329-31 (1965). *See also* Blair, *The Conglomerate Merger in Economics and Law,* 46 GEO. L. J. 672, 679-80 (1958).

8 The Washington Post, Jan. 7, 1968 § E, at 12, col. 1.

9 JOINT ECONOMIC COMMITTEE OF CONGRESS, ANTITRUST AND NATIONAL ECONOMIC POLICY, 5 TRADE REG. REP. ¶ 50,166 at 55,219 (March 17, 1967).

10 *Id.*

11 The Commission's budget for the fiscal year 1966 was $13.5 million. 265 ANTITRUST & TRADE REG. REP. A-18, 19 (August 9, 1966).

cution in the weaponry of antitrust. Both agencies must rely heavily on the voluntary cooperation of the business community in carrying out their assigned tasks. Such cooperation has always been extended, but only when the law has been made clear. The need for clarity is felt both by government and the business community. The businessman does not want to pass up legitimate opportunities for expansion merely because of uncertainty of the law. And the government, if it must arrest the merger movement, can do so only through cooperation born from understanding.

This article is meant to keep the conglomerate merger problem within the realm of public debate. It advocates increased efforts by the government to provide the public and the business community with a precise explanation of the application of the Celler-Kefauver Act to conglomerate acquisitions.[12] To these ends, the article: (1) illustrates the rise of the conglomerate merger by briefly tracing the merger movement of our country since 1900; (2) explains the various classes of conglomerate acquisitions; (3) describes the reasons for government concern regarding these mergers; (4) summarizes government action against conglomerates; and (5) suggests generally various methods through which it is believed that the government can achieve the cooperation of the business community in combatting the problem of the conglomerate movement.

I. Evolution of the Conglomerate Merger Movement

Economic historians inform us that the country has undergone two great corporate merger movements other than the one now in progress.[13] These movements have done much to create, tear down, and rebuild the present structure of our economy. The first of these movements, occurring at the turn of the century, was a long series of huge mergers which established some of the great corporations in such basic fields as steel, petroleum, sugar refining, and a long list of other industries.[14] The pace was rapid: approximately fifty significant manufacturing and mining mergers were consummated yearly during the period from 1898 to 1902, each absorbing ten or eleven firms.[15] The movement was apparently stimulated by politi-

12 15 U.S.C. § 18 (1964).

13 G. Stockings & M. Watkins, Monopoly and Free Enterprise 15-52 (1951); 41 (Levin ed. 1958); R. L. Nelson, Merger Movements in American Industry 1895-1956, at 110 (1959).

14 One historian has pointed out that the *relative* position of present day oligopolists "is accounted for mainly by the merger movement at the turn of the century." J. Weston, The Role of Mergers in the Growth of Large Firms 49 (1961).

15 Whitney, *Mergers, Conglomerates, and Oligopolies: A Widening of Antitrust Targets*, 21 Rutgers L. Rev. 187, 188 (1967).

cal events of the time and a bullish stock market. Opportunity blended with reason as advances in communications and transportation expanded geographic markets.

The second merger movement, in the late 1920's, affected a number of new industries (such as automobiles and parts, various branches of food manufacturing and food retailing) and stratified concentration in many of the older industries.[16] At its peak, it accounted for the elimination of approximately one thousand manufacturing and mining corporations annually.[17] This merger movement, and its predecessor, came to an end, not because of antitrust enforcement, but because of stock market crashes. The effect of the two movements was to transform very materially the structure of the American economy.

The current merger movement began in the closing years of World War II. It represents the largest such movement in our history. The Federal Trade Commission's Bureau of Economics defines a "large" merger as one wherein the acquiring corporation has assets of ten million dollars or more.[18] From the enactment of the Celler-Kefauver Act in 1950 until 1966, there were 923 "large" mergers in manufacturing and mining, the combined assets of the acquired firms totaling 33.4 billion dollars.[19] In 1966, the Commission recorded a new high in "large" merger activity. Ninety-eight mergers were consummated, the combined assets of the acquired corporations totaling four billion dollars.[20] The industries principally involved were electrical machinery, chemicals, non-electrical equipment, food and kindred products, and transportation equipment.[21] Without respect to size, other than to exclude de minimis mergers (those involving substantially less than one million dollars in assets) the annual acquisition rate has risen from 213 in 1943 to 995 in 1966.[22] The record mark was set in 1965, when 1,008 mergers were completed.[23]

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16 J. BAIN, INDUSTRIAL ORGANIZATION 196 (Wiley Ed. 1959).

17 W. THORP & W. CROWDER, THE STRUCTURE OF INDUSTRY 233 (TNEC Monograph No. 27, 1941).

18 STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 90TH CONG. 1ST SESS., THE CELLER-KEFAUVER ACT: SIXTEEN YEARS OF ENFORCEMENT 8 (Comm. Print 1967).

19 *Id.* at 4.

20 Federal Trade Commission Press Release, *Mergers Reached Record Levels Last Year*, Feb. 24, 1967, at 3. The Commission maintains an annual list of firm disappearances via merger in manufacturing and mining dating back to 1940.

21 *Id.* at 3, 9.

22 *Id.* at 5.

23 *Id.*

The current merger movement has come to be identified with the rise of the conglomerate. If we divide the experience since 1948 into three six-year periods, we find that of all the large mergers in manufacturing and mining, horizontals represented thirty-one percent of the total in the first period, declined to less than twenty-five percent in the second, and finally to only twelve percent in the most recent period.[24] Actually, in the most recent six-year interval, 1960-1965, large horizontal mergers have declined not only proportionately, but also in absolute number.[25] In short, horizontal mergers have become less and less important as the merger movement itself has progressed.

Both vertical and conglomerate mergers, on the other hand, have increased. Vertical mergers rose from ten percent to fourteen percent and then to seventeen percent of the total.[26] Conglomerate mergers rose from fifty-nine percent to sixty-two percent and finally, in the last six-year period, to seventy-one percent of the total of all large mergers.[27]

II. The Classes of Conglomerates

The FTC was first alerted to the conglomerate merger when interest was aroused in amending section 7 of the Clayton Act in the late 1940's to plug the "asset-only" loophole. At that time, the Commission was asked to prepare data and submit testimony on the nature of the new developments in particular industries and efforts were made to classify and analyze mergers in terms of their potential effects on competition.[28]

Of the mergers that were occurring, many could be easily earmarked as horizontals, for these involved the merging of two or more concerns producing the same or similar products and serving the same or similar geographic markets. The vertical merger was also easy to visualize. It brought together buyers and sellers at various stages in the flow of products to the final consumer. But there were a large number of other types of mergers that did not fit conveniently into these pigeonholes. Efforts were made to categorize these sports on the basis of the functional relationship between the merging companies. What the Commission discovered, however, was that while

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24 *Economic Concentration Hearings, supra* note 4, at 501 *et seq.* Data has been updated through 1965 through reference to F.T.C. sources. *See* note 18, *supra.*

25 The Celler-Kefauver Act: Sixteen Years of Enforcement, *supra.* n. 18 at 8.

26 *Id.*

27 *Id.*

28 *See* Federal Trade Commission, *The Present Trend of Corporate Mergers and Acquisitions,* S. Doc. No. 17, 80th Cong. 1st Sess. (1947).

some mergers reflected functional relationships in either production or distribution, in others these relationships did not exist.

The Commission broadly categorized these mergers as conglomerate.[29] After subsequent analysis, it further placed them in three subcategories: geographic market extension, product extension and "other". For example, in what has been designated a "market extention" merger, a company engaged in a particular line of business might acquire another firm engaged in the same product line, but serving other geographic areas.[30] A "product extension" merger would involve two firms producing quite distinct products. The companies, while not directly competitive with one another, are functionally related in production or distribution. An example of this type of merger is that reviewed in the recent *Procter & Gamble* case[31]—the union of a soap manufacturer with a bleach producer. The last category of conglomerates concerns mergers between companies that have neither of these relationships, such as a locomotive manufacturer and a tobacco company.[32] The common thread running through the three types of conglomerates is that they bring together firms serving separate economic markets.

III. The Concern About Conglomerates

It has been said that classification is the beginning of wisdom. It certainly is not, however, the end of analysis. The question which led to the foregoing classifications of mergers was: do such mergers adversely affect competition? The Commission's answer was "yes", in certain cases. As a result, when Congress passed the Celler-Kefauver Act it did not limit the application of section 7 to mergers *between competitors.* Instead Congress made it clear that the amendment covered all mergers, horizontal, vertical and conglomerate, where the proscribed anticompetitive effects were found or could be predicted.[33] Congress did not set forth detailed criteria of just

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29 *Id.*

30 *See* Foremost Dairies, Inc. [1963-65 Transfer Binder] Trade Reg. Rep. ¶ 17,217 at 22,285 (FTC 1965); Beatrice Foods Co. [1965-67 Transfer Binder] Trade Reg. Rep. ¶ 17,244 at 22,317 (FTC 1965).

31 FTC v. Proctor & Gamble Co., 386 U.S. 568, 577-78 (1967); *See also* General Foods Corp. v. FTC, 386 F.2d 936, 944 (3rd Cir. 1967).

32 Professor Turner calls such acquisitions "pure conglomerates" or mergers "in which there are no discernible economic relationships between the businesses of the acquiring and the acquired firm." Turner, *supra* note 7, at 1315.

33 The House Report on the 1950 Celler-Kefauver Amendment to Section 7 of the Clayton Act, 64 Stat. 1125 (1951), 15 U.S.C. § 18 (1964) stated:

> [T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of sub-

how conglomerate mergers could injure competition, leaving it to the Commission and the courts to arrive at their own determinations in this relatively uncharted area.

The proponents of the Celler-Kefauver Act were apprehensive about both high market concentration (market power held by the leading firms in an industry) and aggregate concentration (the share of all manufacturing held by the top one hundred or two hundred corporations).[34] Conglomerate acquisitions, of course, have an effect upon national concentration in manufacturing. But they do not result in an immediate change in the level of concentration or the shares of particular competitors in any relevant market. Aside from their contribution to aggregate concentration, conglomerate mergers may result in the transfer of market power from one economic market to another. They may affect other structural conditions important to the existence of competition within a relevant market.[35]

For example, prior to entry by the acquiring firm, the market power within a concentrated industry may have been checked to a considerable extent by such factors as vigorous competition from alternate products, the potential competition of a large company in a functionally related industry, the ease of market entry by small companies and the existence within the market of a fringe of small producers. "Although," as one learned commentator has pointed out, "none of these market characteristics is likely to afford a completely satisfactory substitute for the competitive stimulus found in an unconcentrated market [they] may nevertheless provide significant limitations on market power."[36]

All of these market checks could be directly affected by a conglomerate merger. The entry of a substantial potential competitor

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stantially lessening competition or tending to create a monopoly. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

34 *Id.* at 2, 3.

35 As succinctly stated in a congressional staff report the impact of a conglomerate merger is

> often found in its side effects, rather than in immediate repercussions . . . . The conglomerate corporation . . . can weather a storm of competition or emerging technical obsolescence in one of its areas of interest, while seeking opportunities in other newly developing fields. It has staying power, ready access to the capital markets, accessibility to new Government research and development grants, and supply contract awards.

STAFF OF SELECT COMMITTEE ON SMALL BUSINESS, H. R. 87TH CONG. 2D SESS., MERGERS AND SUPERCONCENTRATION, ACQUISITION OF 500 LARGEST INDUSTRIAL AND 50 LARGEST MERCHANDISING FIRMS 44 (Comm. Print 1962).

36 *Antitrust in an Expanding Economy,* address by Robert A. Hammond (then Chief, Division of Mergers, Federal Trade Commission) before National Industrial Conference Board Conference. March 4, 1965.

via the acquisition route, although it would not increase market concentration, could raise considerably the barriers to further market entry, place small firms at a severe competitive disadvantage, and give the dominant firms an increased opportunity to benefit pricewise from a more secure oligopolistic position.[37] If the substantial potential competitor chose to enter such a market through internal expansion, the result predictably would be different. If the industry were oligopolistically structured, such an intervention might upset the "tight little island" of "contented competition."

The potential for monopolization for a firm serving a number of markets is enormous, for, if need be, the conglomerate can move his resources against a particular market. As Professor Corwin Edwards, one of the leading authorities on the economics of the conglomerate corporation, has said, "a conglomerate need not be internally coherent, but its strength and strategy transcend the discipline of any particular market." It "operates in a series of different markets, in each of which it encounters different competitors and different conditions of demand and supply and thus may be able to charge different prices and make different profits."[38] If the new market is isolated from the conglomerate corporation's other markets, there is no problem of competitive feedback. There are many classic Sherman Act cases involving this kind of predation, and notwithstanding the protestations of some academic economists to the contrary, predatory pricing and discriminatory pricing that "erodes competition" is a fact of industrial life both old and current in antitrust experience.[39]

On the other hand, as a number of markets in which a firm operates expands, the firm may find that it is meeting many of the same competitors in different areas. This "multiplicity of their contracts" may "blunt the edge of their competition."[40] The prospect of retaliation in various other markets must be seriously considered when the use of advantage in one market is contemplated. A quiet-

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37 *See* J. BAIN, CONDITIONS OF ENTRY AND THE EMERGENCE OF MONOPOLY, MONOPOLY AND COMPETITION AND THEIR REGULATION 215, 226-36 (1954); J. BAIN INDUSTRIAL ORGANIZATION 173-76, 249-51 (1967); CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 22-28 (1964).

38 Testimony of Corwin D. Edwards, *Economic Concentration Hearings, supra,* note 4, pt. 1 at 36, 38. *See also* Blair, *The Conglomerate Merger in Economics and Law,* 46 GEO. L. J. 672 (1958).

39 *See e.g.,* Utah Pie Co. v. Continental Baking Co. 386 U.S. 685 (1967); Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277 (7th Cir. 1967); United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D. Tex. 1957).

40 *Economic Concentration Hearings, supra* note 4, at 45.

life attitude may prevail. "Like national states, the great conglomerates may come to have recognized spheres of influence and may hesitate to fight local wars vigorously because the prospect of local gain is not worth the risk of general warfare."[41]

Not only does a "multiplicity of . . . contacts" offer a prospect of easy competition, but it also offers the prospect of collaboration among firms to insure and perpetuate the "easy life." Reference is made to the art of systematic reciprocity.[42] Conglomerate *A* supplies various subsidiaries of conglomerate *B*. Conglomerate *B* supplies various arms of conglomerate *A*. The latter says to *B*, "you buy from me and I will patronize you." As a result, considerations of price, quality and service are ignored, market foreclosure in more than one area is achieved, and economic stagnancy is encouraged.[43]

IV. The Commission and Conglomerates

From the enactment of the Celler-Kefauver amendment[44] to the end of fiscal year 1967, the two antitrust agencies filed a total of 206 merger complaints.[45] Of this number, 153 complaints challenged acquisitions by manufacturing and mining concerns.[46] Ninety-four of these complaints involved "large" acquisitions involving combined assets of 5.3 billion dollars, or about ten percent of all large mergers consummated during the period of reference.[47]

The majority (forty-eight) of section 7 challenges of large acquisitions involved horizontal combinations. Approximately twenty-seven percent of all large horizontal acquisitions consummated during the 1951-1966 period called for public action.[48] Seventeen per-

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41 *Id.*

42 For discussions of anticompetitive business reciprocity see addresses by John R. Reilly, *Antitrust Aspects of Reciprocity,* before Salesmen's Association of the Chemical Industry, February 18, 1965 and *Reciprocity—The End of Innocence,* before The Trade Relations Association, Inc., September 18, 1967; Hausman, *Reciprocal Dealing and the Antitrust Laws,* 77 Harv. L. Rev. 873 (1964).

43 At least two large conglomerates have been recent subjects of charges alleging anticompetitive reciprocity. *See* FTC v. Consolidated Foods, Corp. 380 U.S. 592 (1965); United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y., 1966). *See also* Federal Trade Commission Press Release, January 24, 1968 (Affidavit of Discontinuance by American Standard, Inc., concerning reciprocity practices).

44 The Act was signed by President Truman on December 29, 1950.

45 Staff of Subcomm. No. 5, House Comm. on the Judiciary, 90th Cong., 1st Sess., The Celler-Kefauver Act: Sixteen Years of Enforcement 3 (Comm. Print 1967).

46 *Id.* at 4.

47 *Id.* at 9.

48 *Id.* at 7.

cent of the large verticals contracted during the period were subjects of suit.[49] While conglomerate acquisitions accounted for almost one-quarter of the large mergers consummated, only three percent of such mergers were brought before the courts.[50]

A. *The Commission's Approach to the Analysis of Conglomerates*

As with horizontal and vertical acquisitions, the Commission's initial, and still primary, approach to conglomerate acquisitions involves test cases. The boundaries of the law are probed through selected actions. When decisions or guidance are obtained, the law is applied across the board; and when possible, guidelines are promulgated.[51] During the pendency of the test case, however, there is no assurance that a "hard line" may not be taken with respect to those acquisitions similar to, and contemporaneous with, the merger subjected to judicial test.

To date, the Commission's conglomerate test cases have involved very large corporations. There are many reasons for this; but paramount to the enforcement agencies is the fact that when the size of combining corporations is great, the impact of the combination on competition is likely to be equally great.

B. *Market-Extension Conglomerates*

The Commission's principal effort against conglomerates has involved the market-extension class of acquisitions. Some nineteen percent in terms of numbers and twenty percent in terms of assets of such mergers consummated from 1951 through 1966 have been challenged by one of the antitrust agencies.[52]

It is appropriate that the Commission's primary thrust against conglomerates concern the market-extension variety. In the Commission's Report to the Congress, which was largely instrumental in the amendment of section 7, special emphasis was placed on the danger to competition posed by such mergers.[53] The dairy industry served as the principal illustration used in the report.[54]

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49 *Id.* at 8.

50 *Id.* at 9.

51 *See* Federal Trade Commission, *Enforcement Policy With Respect to Mergers in the Food Distribution Industries*, January 3, 1967.

52 THE CELLER-KEFAUVER ACT: SIXTEEN YEARS OF ENFORCEMENT, *supra* note 45, at 8.

53 *Report of the Federal Trade Commission on the Merger Movement* 37 (1948).

54 *See* H.R. Rep. No. 1191, 81st Cong., 1st Sess. 3 (1949). The Borden Company's acquisitions during the period between 1940 and 1947 were expressly noted by the committee who reported the bill that later became the Celler-Kefauver Amendment. According to another study, by 1948 mergers had accounted for the following percentages of growth by three national dairy firms: National Dairy Products Co., 64

1. Market-Extension Mergers in the Dairy Industry

The Commission's initial proceeding against market-extensions through merger involved Foremost Dairies.[55] The complaint challenged fifty-two acquisitions by one of the largest dairies in the country.[56] The Commission subsequently held that ten of the acquisitions violated section 7. Nine of these acquisitions were horizontal in nature and one amounted to a market-extension merger. With regard to the latter acquisition, the Commission's analysis stressed the factor of potential competition.[57] After observing that concentration within local markets was high, that there was a definite trend toward national concentration in the dairy industry, and that there were substantial barriers to market entry existing within the industry, the Commission concluded that relief from local oligopolies and a developing national oligopoly would have to come from the internal expansion into local markets of companies already operating within the industry. As stated by the Commission:

> When market concentration is high, the main, and sometimes the only restraint on the use of market power by oligopolistic sellers is potential competition. This makes it imperative that especially those independent firms with the capacity to offer present and potential competition must not be eliminated by their potential rivals.[58]

The Commission's reliance on the factor of potential competition in analyzing market-extension acquisitions was further expounded in its proceedings in *Beatrice Foods*. According to the complaint, Beatrice, at the time of suit, was the third largest dairy company in the nation; one whose growth was largely attributed to a pattern of acquisitions. In cancelling several of Beatrice's market-extension mergers, the Commission made the following points:

(a) The degree of concentration within a market determines the competitive strategy employed by its members.

> In markets where one or a very few firms control a large part of the total sales, there is a tendency for all firms to refrain from vigorous price competition. Each large seller knows that if he makes an across-the-board price cut, the inroads on his

%; Beatrice Foods Co., 63%; and Borden Company, 75%. J. WESTON, THE ROLE OF MERGERS IN THE GROWTH OF LARGE FIRMS 141 (1953).

55 Foremost Dairies, 60 F.T.C. 944 (1962).

56 In 1950, Foremost's sales were $48,000,000. During the period covered by the complaint, 1951-1955, respondent acquired firms with combined sales of $342,446,744. In 1955, respondent had sales of $388,068,990.
Id. at 1049.

57 *Id.* at 1087-89.

58 *Id.* at 1089.

> major competitors' market shares will be so palpable that they will be compelled immediately to make a corresponding price cut—and that consequently there is little advantage to be gained from price cutting. The small firms in such a market are also inhibited from initiating price competition. They know that the majors will react promptly, perhaps with drastic effect, to any attempt to disturb the price structure.[59]

(b) Other market factors may limit the power of sellers within an oligopolistic market.

> One such force is the condition of entry by new competitors. It may be such that many firms can and promptly do enter the market and establish themselves as viable and substantial competitors, thereby eroding the market power of the dominant sellers. Moreover, the mere prospect of new competition may have a salutary effect. The large seller in a concentrated market knows that the entry of new competitors would jeopardize the stable price structure of the market and might well lead to lower prices, as a result of greater competition, and lower profits. He also knows that if prices in the market are so high as to make it easy for a new competitor to cover his costs, make a healthy profit, and still be competitive with the firms presently operating in the market, the attractiveness of entry to prospective competitors will be great, and the likelihood of actual entry substantial.[60]

(c) Potential competition may have a salutary effect on competition within a highly concentrated market.

> It disregards business realities to view such a firm [a potential competitor], which may be as much a real competitive factor as the firm currently selling in the market, as being entirely "outside" the market, or to deny that, just as the elimination of an actual competitor may adversely affect the competitive structure of a market, so may the elimination of a potential competitor.[61]

Both the *Foremost* and *Beatrice* matters terminated in consent orders prior to review by the courts. Other proceedings involving market extension conglomerates within the industry were settled by consent orders prior to determination by the Commission.[62] The

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59 Beatrice Foods Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,244 at 22,330 (FTC 1965).

60 *Id.*, at 22,330.

61 *Id* at 22,330.

62 The Borden Co., [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,869 at 21,860 (FTC 1964), Order accepting agreement containing order to cease and desist; National Dairy Products Corp., [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,282 at 21,110 (FTC 1963), Order waiving notice and accepting agreement containing order to cease and desist.

essence of the dairy cases was that when markets become highly concentrated, rivalry between and among the leading firms in the market is likely to be dulled. The members of the industry become "interdependent;" they tend to avoid price competition and tacitly or otherwise collaborate to hold prices above competitive levels. This may work if entry is difficult. Even when entry is difficult, however, the large producers in other geographic markets may threaten to scale the entry barriers and share in the profits. So even the threat of potential competition may hold "monopolizing" in the local market in check. On the other hand, if the potential competitor comes into the market by buying one of the dominant firms, this restraining influence is eliminated, and at the same time, the barriers to other new entrants are raised even further.

2. Food Retailing

In the area of food retailing, the Commission has issued a number of complaints attacking market-extension through acquisition, only one of which has been the subject of a final Commission decision, and none of which has been reviewed by the courts.[63] Nevertheless, the one case judged by the Commission and the expertise developed through similar cases settled by consent orders and industry-wide hearings, led to the promulgation of merger guidelines pertaining to horizontal, vertical and market-extension acquisitions within the food retailing industry.[64]

The Commission's actions in this area began in 1959 through the issuance of complaints against the National Tea Co. and Kroger. As of this writing, five "chains" have been challenged by the Commission, the attacked mergers being either horizontal ones or conglomerate market-extensions. Another "chain" was the subject of

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63 The Commission issued Section 7 complaints against the National Tea Co., [1959-60 Transfer Binder] TRADE REG. REP. ¶ 27,881 at 36,947 (FTC 1959); Grand Union Co., [1961-63 Transfer Binder] TRADE REG. REP. ¶ 15,680 at 20,511 (FTC 1962); Kroger Co., [1959-60 Transfer Binder] TRADE REG. REP. ¶ 27,885 at 36,954 (FTC 1959); Consolidated Foods Corp., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,403 at 22,607 (FTC 1965); Winn-Dixie Stores, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,694 at 22,989 (FTC 1966). The sole case decided by the Commission was National Tea Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,463 at 22,694 (FTC 1966). The respondent did not appeal this decision.

64 Federal Trade Commission, *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, January 3, 1967. According to the Commission, these "guidelines" represent an attempt to "spell out as clearly as possible those [food retailing industry] mergers which the Commission's experience and knowledge suggest as most likely to have anticompetitive consequences." In essence, the guidelines prohibit mergers which result in combined annual food store sales in excess of $500 million annually.

a proceeding brought by the Antitrust Division of the Department of Justice.[65] Together, these complaints challenged mergers accounting for sales of 760 million dollars.[66] All but one of the Commission's proceedings have been terminated by orders, and three have resulted in divestitures.[67]

The *National Tea* record vividly demonstrated how market power could be spread from one local market to another through a series of market-extension acquisitions; the results being not superior economic efficiency, but rather the use of market power to extract high returns on investment through higher prices to the consumer and discriminatory price concessions demanded from suppliers, and the promotion of a "quiet-life" form of competition enjoyed by national firms in local markets.[68]

The record revealed that during the period from 1951-1959, National Tea acquired twenty-six corporations owning some 485 retail groceries in 188 cities. The acquired companies were, at the time of acquisition, healthy and profitable enterprises. By 1959, National was operating over nine hundred stores in approximately five hundred cities.[69] The company's market position could be recognized in 399 of these markets. "In 258 of these 399 cities, respondent had 10% or more of the market; in 175 of them, 15% or more; in 120, 20% or more; in 73, 25% or more; and in 29 cities, more than 35% of the market."[70] In the lowest level of market control, National enjoyed less than five percent of the business (some forty-eight cities). In the top level, it enjoyed a market share of more than thirty-five percent (some twenty-nine cities).[71] There was a direct correlation between market share achieved through acquisition, or other reduction in market membership, and the profits achieved. The company experienced no earnings in those cities in

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65 THE CELLER-KEFAUVER ACT: SIXTEEN YEARS OF ENFORCEMENT, *supra* note 45, at 20.

66 OHIO REV. CODE ANN. § 4112.05 (b) (Page 1965).

67 National Tea Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,463 at 22,694 (FTC 1966), 10 year ban against further acquisitions; The Grand Union Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,265 at 22,365 (FTC 1965), Divestitures and ten-year merger ban; Winn-Dixie Stores, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,694 at 22,989 (FTC 1966), Divestitures and ten-year merger ban; Consolidated Foods Corp., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,403 at 22,607 (FTC 1965), Divestitures and proscription against further mergers.

68 For a penetrating discussion of the *National Tea* decision *see* Mueller, *Antitrust and Economics: A Look at "Competition,"* 10 ST. LOUIS U. L. J. 482 (1966).

69 National Tea Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,463 at 22,694 (FTC 1966).

70 *Id.* at 22,699.

71 *Id.* at 22,700.

which its market share was in the lower level; it lost some five cents on each sales dollar.[72] In those cities in which its market power was evident, however, its earnings well exceeded three percent of sales.[73] "And in its single most profitable city, its stores had earnings of approximately 7 cents per dollar of sales. This translates into an after-tax return of some 40% on stockholders' investment."[74]

Yet, as pointed out in the Commission's opinion, National Tea offered no argument concerning superior economic efficiency. Instead, the company readily acknowledged that its own vast operation (nine hundred stores in eighteen states with yearly sales of approximately 800 million dollars) offered no efficiency over large, one-outlet competitors.[75] Moreover, the *National Tea* record demonstrated the legitimacy of concern pertaining to "multiplicity of contacts" among conglomerates. National and other growing "chains" met each other, mainly because of market-extension acquisitions, in more and more markets. According to one of National's executives, "interstate chains pretty well shared [our] opinion" about competition. Therefore, to the witness, his greatest competition came from the "local competition which operated more than one store."[76] This competition provided the prime source for National's acquisitions.

3. The Department Store and Bread Industries

In recent years, the Commission has also proceeded against market-extension acquisitions in the department store and bread industries. The complaints charged that the challenged mergers: (1) eliminated potential competition; (2) raised barriers to market entry; (3) disadvantaged small firms operating within the relevant markets; and (4) contributed to pronounced industry trends toward concentration.[77] As of this writing, there have been three proceedings in each industry. All have resulted in consent settle-

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72 *Id.* at 22,699.

73 Mueller, *supra* note 68, at 509.

74 *Id.* at 509-10.

75 National Tea Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,463 at 22,700 (FTC 1966).

76 *Id.* at 22,698.

77 Continental Baking Co., [1960-61 Transfer Binder] TRADE REG. REP. ¶ 28,774 at 37,382 (FTC 1960); Campbell Taggart Associated Bakeries, [1960-61 Transfer Binder] TRADE REG. REP. ¶ 28,851 at 37,410 (FTC 1960); American Bakeries Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,695 at 22,990 (FTC 1966); Federated Dep't Stores, [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,308 at 22,460 (FTC 1965); Broadway-Hale Stores, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,502 at 22,769 (FTC 1966); May Dep't Stores Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,684 at 22,983 (FTC 1966).

ments.[78] In only one of these settlements was divestiture required of market-extension acquisitions, and therein a minority of the Commission termed the relief "token" in nature.[79] In the other five proceedings, the respondent companies agreed to refrain from further industry acquisitions without first securing Commission approval. The Commission's reasoning behind such settlements may not be found in any of these matters.

C. *Product-Extension Mergers*

Since the enactment of the Celler-Kefauver Act, the great bulk of "large" conglomerate mergers has been of the product-extension variety. A total of 424 of the 590 "large" conglomerate acquisitions consummated during the period from 1951 through 1966 have been labeled as product-extensions.[80] Ten such mergers have been challenged by the government.[81] Three Commission cases have reached the courts, all resulting in orders requiring cancellation of the challenged acquisitions through divestitures.[82] Several others have been settled,[83] one such settlement being publicly criticized by the two dissenting members of the five member Commission.[84]

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78 Continental (Order issued April 2, 1962); Campbell-Taggart (Order issued 1967); American Bakeries (Order issued Sept. 14, 1966); Federated Department Stores (Order issued Aug. 5, 1965); Broadway-Hale Stores (Order issued April 20, 1966); May Department Stores (Order issued Sept. 9, 1966).

79 Campbell Taggart Associated Bakeries, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,626 at 22,891 (FTC 1967). (dissenting statements of Commissioners Jones and Reilly).

80 THE CELLER-KEFAUVER ACT: SIXTEEN YEARS OF ENFORCEMENT, *supra* note 45, at 7.

81 *Id.*

82 FTC v. Proctor & Gamble Co., 386 U.S. 586 (1967); General Foods Corp. v. FTC, 386 F.2d 936 (3rd Cir. 1967); Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965).

83 *See, e.g.,* Proctor & Gamble Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,858 at 23,215 (FTC 1967), Order accepting agreement containing order to cease and desist (acquisition of J.A. Folger & Co., the country's largest independent coffee company); W. R. Grace & Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,891 at 23,237 (FTC 1967), order accepting agreement containing order to cease and desist (acquisition of the country's third largest producer of intermediate chocolate); Foremost Dairies, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,835 at 23,203 (FTC 1967), order accepting agreement containing order to cease and desist (acquisition of the only nationwide wholesale distributor of drugs).

84 *See* Proctor & Gamble Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,858 at 23,215 (FTC 1967), (dissenting statements of Commissioners Reilly and Jones). *See also* Reilly, *Myths and Merger Policy,* 12 ANTITRUST BULL. 605, 619-20 (1967).

The principal product-extension case to date is that concerning Procter & Gamble's acquisition of the Clorox Chemical Co. In this case, the Supreme Court ruled for the first time on the applicability of section 7 to a product extension merger.[85] Accordingly, the significance of the decision can hardly be overstated.

The case involved the acquisition of the leading manufacturer in the heavily concentrated liquid bleach industry by Procter & Gamble, the largest diversified manufacturer of low-priced, high-turnover household products, principally soaps, detergents and cleansers. Procter was thus able to extend its line of laundry products by the acquisition of a closely related item, liquid bleach.[86] Insofar as the Court was concerned the crucial findings by the Commission were that the substitution of Procter for Clorox brought about an enormous discrepancy in the size of competitors in the liquid bleach industry, that this size disparity significantly increased entrance barriers, and that it would discourage active competition from firms already in the industry due to fear of retaliation from Procter. Of considerable importance in connection with the probability of increased barriers to entry was the finding that the major competitive weapon in the successful marketing of bleach is advertising. It was reasoned that Procter not only would be able to use its volume discounts in advertising Clorox but that it could divert a large portion of its sizable advertising budget to meet the short term threat of a new entrant.[87] The Court also gave weight to the findings that Procter might induce retailers to give it preferred shelf space and that it might underprice Clorox in order to drive out competitors and subsidize the underpricing with revenues from other products.

The Court concluded that prior to the merger Procter was the

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85 FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

86 Prior to the acquisition, Procter was in the course of diversifying into product lines related to its basic detergent-soap-cleanser business. Liquid bleach was a distinct possibility since packaged detergents—Procter's primary line—are used complimentarily in washing clothes and fabrics, and in general household cleaning . . . .

The decision to acquire Clorox was the result of a study conducted by Proctor's promotion department. [It] recommended that Procter purchase Clorox rather than enter independently. Since a large investment would be needed to obtain a satisfactory market share, acquisition of the industry's leading firm was attractive. "Taking over the Clorox business . . . could be a way of achieving a dominant position in the liquid bleach market quickly. . . ." *Id.* at 573-74.

87 *Id.* at 575, 578-79. The Court also stated that possible economies cannot be used as a defense to illegality. "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." *Id.* at 580.

most likely entrant and absent the merger would have remained on the periphery, restraining Clorox from exercising its market power. It further concluded that by the removal of Procter as a prospective entrant the acquisition eliminated the leading source of new growth in the liquid bleach industry.[88]

There have been expressions of disappointment from some sources that the Court did not provide specific guidelines in *Procter* for determining the legality of conglomerate mergers. Normally, the Court will not go out of its way to enunciate specific doctrines for the guidance of government agencies. It will do so when it is apparent that the law enforcement body is off the track and needs specific instructions in carrying out its functions. In this case, however, it seems obvious from the opinion that the Court is in full agreement with the Commission's approach to section 7 enforcement against conglomerate acquisitions. By not spelling out guidelines and by making clear that all mergers must be tested by the same standard, it has left it up to the Commission to make the determination on a case-by-case basis whether conglomerate mergers have the prescribed anticompetitive effects. It has thus imposed upon the Commission the task of preparing its own guidelines in future proceedings.

Whether much guidance has yet been provided by Commission actions against product-extension acquisitions is debatable. Of the three matters to reach the courts, two were quite similar in regard to certain basic facts and possible adverse effects on competition; all three were alike in that they involved acquisitions by a dominant manufacturer in one field acquiring a dominant producer in another, but related, field.

In *General Foods Corporation* a divided Commission found that respondent's acquisition of one of the two leading steel wool soap pads manufacturers, The S.O.S. Co., was very similar to the Procter & Gamble — Clorox matter in regard to anticompetitive tendencies.[89] Upon appeal, the Commission's order of divestiture was affirmed, the Third Circuit finding a number of parallels between the case and the Procter & Gamble — Clorox matter.[90] In *Ekco Products Company* one of the nation's leading manufacturers of housewares—kitchen tools, tinware, kitchen cutlery, etc.—acquired the country's largest producer of commercial meat-handling equip-

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88 *Id.* at 580-81.

89 General Foods Corp., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,465 at 22,719 (FTC 1966).

90 General Foods Corp. v. FTC, 386 F.2d 936 (3rd Cir. 1967).

ment.[91] The Commission ordered divestiture primarily on the bases that the acquisition might serve to entrench monopoly, and that it eliminated the substantial potential competition posed by the respondent. In affirming the Commission's decision, the Seventh Circuit pointed out, "[b]ecause of the unique factual situation here and the lack of decisional guidelines, we limit this holding to the facts of this case."[92]

D. *Reciprocity*

In another key conglomerate merger case decided by the Commission and affirmed by the Supreme Court, there was no significant functional relationship between Consolidated Foods, a large grocery wholesaler and food manufacturer and Gentry, a manufacturer of dehydrated onion and garlic.[93] Dehydrated garlic and onions are sold to certain food processors, who in turn sell their products to the food supermarkets. Because Consolidated bought food products, it could engage in reciprocity with food processors who need onions and garlic. This gave Consolidated a potentially decisive advantage over other garlic producers. It was this anticompetitive reciprocity that the Commission and the Supreme Court found to be the element in this conglomerate merger that made it illegal.[94]

Reciprocity opportunities arise not because of a direct functional relationship between two merging parties, but because of the way in which a large corporation may lengthen and pool its buying power in order to make sales. Economists view this as alien to the competitive process.[95] Sales should be made on the basis of quality, price and service, not on the basis of reciprocity. Minimal reciprocity may well be innocuous, but if it is practiced on a broad scale by giant corporations, it will certainly pose a grave danger to competition.

In one other conglomerate complaint brought by the Commission, a potential for anticompetitive reciprocity was cited as a possible adverse competitive effect.[96] The challenged merger in-

91 Ekco Products Co., [1963-65 Transfer Binder] TRADE REG. REP. ¶ 16,956 at 22,017 (FTC 1964).

92 Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965).

93 FTC v. Consolidated Foods, 380 U.S. 592 (1965).

94 *Id.* at 599-600.

95 *See, e.g.*, Stockings & Mueller, *Business Reciprocity and the Size of Firms*, 30 J. BUS. U. CHI. 73, 75-77 (1957); Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 342 (1955).

96 Foremost Dairies, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,835 at 23,203 (FTC 1967) Order accepting agreement containing order to cease and desist.

volved Foremost Dairies and McKesson & Robbins, one of the country's leading drug wholesalers. The complaint charged that the prospective union would, among other things, damage competition by permitting Foremost to use its position in several areas to further sales of one of its products through reciprocal trading. The matter was settled without trial, with the consent order delineating a restriction against the use of reciprocal trading agreements.

The *Consolidated Foods* case serves notice that an acquisition posing the substantial probability of reciprocal purchasing in a concentrated market is a likely candidate for government action looking toward divestiture.[97] And this writer wholeheartedly agrees with Professor Broadley that "antitrust policy as to mergers involving reciprocity should be part of a general policy of controlling oligopoly power."[98]

E. *"Other" Conglomerate Mergers*

To the author's knowledge, the government has yet to challenge publicly an acquisition in which there was no economic relationship existing between the acquiring and acquired firms. Yet these mergers account for nearly one-fifth of the conglomerate acquisitions presently being consummated.[99] To some experts, there is a serious question concerning the application of the Celler-Kefauver Act to the "other" class of conglomerates—amalgamations contributing to overall concentration instead of specific market concentration.[100] Nevertheless, some of the criteria used by the Commission and the courts in evaluating both the market extension and product extension forms of conglomerate acquisitions—potential competition and the raising of barriers to market entry—are equally applicable to the "other" variety of conglomerate mergers. Moreover, at least one acquisition challenged by the Commission that resulted in consent settlement could be considered as being akin to an "other" conglomerate.[101]

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97 *See* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 328 (1967).

98 *Id.* at 329.

99 THE CELLER-KEFAUVER ACT: SIXTEEN YEARS OF ENFORCEMENT, *supra* note 45, at 7.

100 *See* Everette MacIntyre, *Antitrust, Real or Fanciful*, before Business Public Relations Seminar, May 4, 1966; *U.S. Aide [Ass't Attorney General Donald F. Turner] Hints at Trust Law to Bar, "Super-Concentration,"* The Evening Star (Wash., D. C.), April 15, 1966; Testimony of Corwin D. Edwards, *Economic Concentration Hearings, supra*, note 4, pt. 1 at 44, 45.

101 Foremost Dairies, Inc., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,835 at 23,203 (FTC 1967). Foremost, a large dairy products manufacturer, acquired Mc-

F. *Unreported Commission Actions Concerning Conglomerates*

The above recital does not do justice to the Commission's enforcement effort against potentially anticompetitive conglomerate mergers. Within the past two years, a good number of "large" conglomerate acquisitions have been cancelled prior to consummation because the parties were informed that Commission challenge under Celler-Kefauver could be expected, or because the parties believed that pre-merger inquiries initiated by the Commission would lead to prosecutions. These matters involved all three categories of conglomerates. While the Commission is not always informed as to which acquisitions have been abandoned as a result of inquiries, it has noted "that during the calendar year 1967 some 12 large mergers, each involving proposed acquisitions of firms with assets in excess of $10 million, were dropped during the pendency of expedited investigational procedures."[102] The total assets of the 12 proposed acquisitions aggregated 2.1 billion dollars.[103] By the end of the first two months of 1968, similar abandonments totaled $800 million in assets.[104]

V. Conclusion

The emphasis in this summary of government action against conglomerate acquisitions has been placed upon Federal Trade Commission enforcement activities. Such emphasis is demanded by the record. The Commission has been much more active in public examination of conglomerate acquisitions than the Antitrust Division of the Department of Justice. Whatever public guidance exists in this area of the law stems almost exclusively from Commission actions. While conglomerate merger guidelines have been promised by the Antitrust Division for the past several years, they have yet to be released.

Commission effort in the conglomerate merger area may be described as a "holding action"—a series of probes that have produced some results which, through extrapolation, have given the Commission a stronger hand to negotiate settlements of future controversies. This approach has undoubtedly placed a rein upon the

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Kesson & Robbins, Inc., the only nationwide wholesale distributor of drugs. (There were, however, questions concerning reciprocal trading; and Foremost had a limited interest, prior to the merger, in the production and sale of pharmaceutical preparations.)

102 Federal Trade Commission, *Merger Activity Set New Record Last Year*, FTC Reports 3.

103 *Id.*

104 *Id.*

conglomerate movement. Industry does take the government's attitude into consideration when contemplating acquisitions. Certain mergers have been discouraged or abandoned because of Commission statements or actions.

However, industry uncertainty about the law has not been diminished. Is a sewing machine manufacturer a significant potential competitor of a producer of lawn mowers? Do his initial inquiries concerning internal expansion into the lawn mower field, as revealed by inter-office documentation, preclude the option to enter through acquisition? Will the test of potential competition always be objective in nature and not subjective? Does the replacement of a large market entity by an even larger company always raise barriers to market entry and disadvantage established but smaller companies operating within the market? Does a predictable increase in barriers to market entry alone render an acquisition unlawful? Must a corporation which emphasizes promotion of consumer acceptance of its products through the use of prime-time television forebear from the acquisition of companies whose products may be promoted in the same manner? Do sales dollars and/or assets constitute relevant product markets when large corporations contemplate merger?

Unless his matter fits within the square corners of a judicial decision, the businessman cannot be sure of the validity of a proposed conglomerate acquisition. Consent settlements offer only a vague starting point for bargaining. Guidelines, in terms of assets and sales dollars, are available only for food retailers. Advisory opinions issued by the Commission deal primarily with failing companies[105] because of the procedure's unavailability for matters that require extensive Commission inquiry.[106]

As noted, the Commission's primary approach toward meeting the conglomerate merger problem has been the litigation of test cases. Yet only four of these cases have passed through the courts. One is of but slight import[107] and one deals solely with reciprocity.[108] The remaining two portray similar situations.[109] The other conglomerate complaints issued by the Commission were settled through consent orders before Commission hearings or after deci-

105 FEDERAL TRADE COMMISSION, DIGESTS OF PRE-MERGER ADVISORY OPINIONS ISSUED BY FTC, (Feb. 13, 1968).

106 *See* 16 C.F.R. § 1.1 (1968).

107 Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965).

108 FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

109 FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); General Foods Corp. v. FTC, 386 F.2d 936 (3rd Cir. 1967).

sions by the Commission. The recent trend has been toward simultaneous issuance and settlement of conglomerate merger complaints.

The section 7 consent order, perhaps more than any other form of litigative settlement, is carefully studied by non-parties and used as a guide to future action. It is also viewed as controlling precedent by corporate counsel. While in public office, this writer frequently read briefs or heard arguments in which counsel for merging corporations contended that the Commission required such and such a remedy in a particular consent matter and, therefore, should require the same remedy in the matter under review. Often the analogies drawn by counsel were correct on their face.

The short of it, however, is that consent settlements presently offer little guidance to the antitrust bar and its clients. In similar matters within the same industry, Commission settlements have differed.[110] In regard to acquisitions involving industries similarly structured and similarly plagued by trends toward concentration, public relief has differed.[111] In several matters, settlements have been reached which, according to the Commission minority, were unresponsive to the charges made in the complaints.[112] Some conglomerate firms have been granted "one-last-bite-at-the-apple." Their acquisitions have been permitted to stand in return for a ban against further mergers. Others have been required to make "token" divestitures or divestitures of properties other than the acquisition at issue. And in some cases, the proposed acquisition has been blocked.

There is warrant to suspect that at this point in time, the Commission, in accepting consent settlements of conglomerate merger actions, decrees *ad hoc* public remedies on bases which are vague, obscure, and, perhaps, idiosyncratic. At this stage of the conglomerate merger movement, a substantial number of cases should be litigated. The Commission's views should in some measure be derived from comprehensive trial records and then evaluated by the courts. There is no doubt that "[e]lucidation of reasonable and realistic standards for testing conglomerate mergers is still an important item of unfinished business for the enforcement agencies and the courts."[113]

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110 Compare the Commission's settlements of market extension complaints in the bread industry.

111 Compare the complaints and consent orders regarding market extension mergers in the dairy industry with the complaints and consent orders concerning market extension acquisitions in the bread industry.

112 *See, e.g.*, Proctor & Gamble Co., [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,858 at 23,216-17 (FTC 1967) (Dissenting statements of Commissioners Reilly and Jones).

113 Address by Commissioner Philip Elman, *Clorox and Conglomerate Mergers*, Antitrust Law Section, American Bar Association, August 1, 1967.

This is not to say that the Commission should declare a moratorium on section 7 consent orders. It is only advocated that the Commission and industry be less prone toward acceptance of such orders, and that when such orders are issued they should be explained. While a member of the Commission, the writer advocated holding consent settlements of conglomerate merger actions up for public approval.[114] It was also advocated that the Commission offer its reasons for proposing acceptance of settlements of section 7 actions.[115] When the Commission revised its Rules of Practice in July of 1967, it provided for the public proposal of consent orders for a period of thirty days prior to Commission acceptance;[116] however, it has yet to deem warranted the publication of its reasoning behind the acceptance of proposed acceptance of a settlement order. Such exposition or agency thinking has long been advocated in the antitrust field.[117]

Finally, this article cannot be concluded without acknowledging that the Commission, when one considers its budget, has been doing a creditable job. The service that the American taxpayer has received to date greatly exceeds his payment when one reflects that the Commission may not even spare one-tenth of its very limited budget to combat a problem that covers the breadth of American industry.

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114 *See, e.g.*, Reilly, *Myths and Merger Policy*, 12 ANTITRUST BULL. 605, 620, (1967); Address by John Reilly, *Mergers and the Law — 1967*, Antitrust Section, Ohio State Bar Association, May 12, 1967.

115 *Id.*

116 16 C.F.R. § 2.34 (1968).

117 *See, e.g.*, Phillips, *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39, 54 (1961); GOLDBERG, THE CONSENT DECREE: ITS FORMULATION AND USE 70 (1962).